



David Peters  
Kinsman Legal  
54 Bunbury Street  
Footscray, VIC 3011

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Anti-Dumping Commission  
Level 6, 215 Spring Street  
MELBOURNE VIC 3000

By email: [Leisa.Baynham@adcommission.gov.au](mailto:Leisa.Baynham@adcommission.gov.au), [Investigations3@adcommission.gov.au](mailto:Investigations3@adcommission.gov.au)

**PUBLIC RECORD**

**Investigation 548 (the investigation) – Certain kraft paperboard exported from the United States of America (US)**

**Submission on behalf of Graphic Packaging International LLC and Graphic Packaging International Australia Converting Ltd (GPI) to the Anti-Dumping Commission (ADC)**

**Application for publication of dumping duty notice (the application) by Visy Glama Pty Ltd (Visy)**

Dear Leisa

GPI refers to the report prepared for the ADC by Dr Nafty Vanderhoek of Expertsdirect (the Vanderhoek report).

GPI also refers to the expert evidence provided to the ADC in the report by Charles P Klass on 4 June 2020 and in the supplementary report by Charles P Klass on 26 July 2020.<sup>1</sup>

GPI makes the following submissions:

1. The Vanderhoek report does not assist the ADC to form a view that microflute is a like good to kraft paperboard because the Vanderhoek report does not address or answer that question (see section 1 below).
2. The Vanderhoek report, together with Visy propose a radical change to the conventional like goods assessment. The ADC would be better advised to assess its wider implications before deploying it in a live investigation. See section 2 below.
3. The Vanderhoek report makes its comparison at end use product level only in relation to “12+ beverage can multipacks” and so does not account for the fact that:
  - a. substantially more than half and probably closer to

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<sup>1</sup> The expert evidence provided to the ADC was prepared in accordance with the Federal Court of Australia Expert Evidence Practice Note (GPN-EXPT). This submission refers to these reports respectively as the Klass Report and the Supplementary Klass Report and together as the Klass Reports.

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[**confidential proportion** ██████████] of kraft paperboard imported to Australia is not used for such packaging (see section 3.a below); and

- b. a significant proportion of microflute produced in Australia is not used for such packaging (see section 3.b below).
4. There is substantially uncontested expert evidence before the ADC that squarely considers and answers the question of whether microflute is a like good to kraft paperboard, the Klass Reports (see section 4 below).
5. The Vanderhoek report, if anything, confirms aspects of expert evidence provided in the Klass Reports. In particular, microflute may not exist other than transiently in an inline converting process (see section 5 below).
6. The ADC must assess and evaluate the Vanderhoek report as it would any other evidence before it in the investigation; the Vanderhoek report does not have a special status by virtue of the fact that the ADC engaged its own expert (see section 6 below).
7. There are other issues with the Vanderhoek report, which are addressed in section 7 below.

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1. The Vanderhoek report does not assist the ADC to form a view that microflute is a like good to kraft paperboard
  1. GPI submits that the Vanderhoek report does not assist the ADC to form a view that microflute is a like good to kraft paperboard because the Vanderhoek report does not address or answer that question. Instead it states its conclusions only in terms of a particular end use for those products.
  2. The ADC's letter of instruction duly states the goods description, both at paragraph 1 and again at paragraph 11, as it appears in the application as:

Kraft paperboard, coated on one side with clay or other inorganic substances, grammage 360-430 grams per square metre (GSM), wet strength treated.
  3. Up until the current investigation it has been entirely orthodox and uncontroversial in Australian anti-dumping investigations that the question of likeness starts and finishes with the goods description. Are the goods that are claimed to be like goods alike to the goods under consideration (ie the goods described in the goods description)?
  4. In fact, the letter of instruction made it clear that the orthodox approach should be taken ie that the goods as defined in the goods description are the proper comparator (being intermediate products and not products produced from the goods further down the supply chain), at paragraph 1:

Both kraft paperboard and microflute are an intermediate product which may be further processed into a final product which is later consumed in Australia.
  5. The necessary implication of the letter of instruction was that the task assigned to Vanderhoek was to compare the two intermediate products, ie kraft paperboard and microflute, not some final product that may come into being following further processing in Australia. That also appears to be the legally orthodox approach; there is no ability to take (let alone reverse engineer) the interpretation of a statutory term (here the terms "like goods" or "characteristics closely resembling those of the goods") from an expert opinion.<sup>2</sup>
  6. To recap on its earlier submissions by way of background, GPI does not import 12+ beverage can multipacks so it cannot possibly have been dumping 12+ beverage can multipacks.<sup>3</sup> Rather, GPI imports kraft paperboard (some of which may later be

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<sup>2</sup> *Australian Gas Light Co v Valuer-General* (1940) 40 SR (NSW) 126 at 137 as cited in Aronson et al *Judicial Review of Administrative Action and Government Liability*, 6ed, at [4.220].

<sup>3</sup> See for example section 4 of GPI's 21 September 2020 submission entitled "The goods are large rolls of unprinted kraft paperboard, not beverage can multipacks as Visy argues, neither are they printed sheets of corrugated cardboard".

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further processed into 12+ beverage can multipacks). Therefore, the better case that Visy (or any other person arguing that the like goods test is met) can put forward is that it produces something that is alike to kraft paperboard.<sup>4</sup> Notwithstanding, Visy has emphatically rejected that orthodox approach, arguing that the goods and like goods should only be those “that are converted into final products used for finished beverage can multi-packs”.<sup>5</sup>

7. Now, the Vanderhoek report conclusions seek to make a chosen end use of microflute and kraft paperboard even more central to the investigation.<sup>6</sup> Indeed, Dr Vanderhoek chided all parties, apparently including Visy, for not focussing *more* on particular end use specifications and that failure to do so was “an unfortunate and regrettable omission”.<sup>7</sup> In reaching those conclusions Dr Vanderhoek appears to have ignored the plain words of his letter of instruction.
8. It would be surprising enough if Dr Vanderhoek reached conclusions in terms of end use *in spite* of the differences between kraft paperboard and microflute; however it appears that Dr Vanderhoek reached his conclusions in terms of end use, at least in part, *because* of the differences between kraft paperboard and microflute, at paragraph 6.15 (emphasis added):

So again, technology allows for multiple choices with performance only logically and sensibly compared at the final box stage; that is, after completion of all processing steps and not at any intermediate point, *particularly where these intermediate points may differ.*

9. The reasoning seems designed to overlook the differences between kraft paperboard and microflute. We are told that we particularly must look at another stage of production when intermediate products differ (when, GPI contends, it is the differences of the intermediate products that are in question). In any event, Dr Vanderhoek considers only a similar final product in making his conclusions, ie 12+ beverage can multipacks; he does not consider the different end uses for kraft paperboard (most of it is used for other applications)<sup>8</sup> or for microflute (there is at least one other substantial producer of microflute used for other end uses in Australia).<sup>9</sup> Section 3 of this submission addresses those other end uses in the context of a focus on end use for a like goods assessment.

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<sup>4</sup> GPI’s 21 September 2020 submission at paragraph 53.

<sup>5</sup> Visy’s submission dated 18 June 2020 at section 3.7.

<sup>6</sup> Vanderhoek report at section 7.

<sup>7</sup> Vanderhoek report at paragraphs 6.8 and 6.9.

<sup>8</sup> See for example section 1.b of GPI’s submission of 21 September 2020 and section 2.b of GPI’s first submission of 13 May 2020.

<sup>9</sup> See section 3 of GPI’s submission of 21 September 2020 and the Addendum to GPI’s submission of 26 July 2020.

2. Visy, Vanderhoek propose a radical change to conventional like goods assessment
  10. GPI submits that Visy and Vanderhoek are in effect proposing a radical change to the conventional like goods assessment. The ADC would be better advised to take the proposal on notice and assess its wider implications before deploying it in a live investigation.
  11. In making his report, Dr Vanderhoek, together with Visy has invited the ADC to venture into uncharted waters in its assessment of like goods; and not only in its assessment of like goods but also in the subsequent assessments of dumping margins, injury and the imposition of dumping duties. It might be a valuable exercise for the ADC to reflect on how those stages might look in findings that centre on end use rather than the goods as they cross the Australian docks:
    - a. Injury: WestRock has already stated that none of the kraft paperboard it imports that fits the goods description is used for 12+ beverage multipacks<sup>10</sup> and only [confidential proportion ██████████] of the kraft paperboard that GPI imports is used for 12+ beverage multipacks.<sup>11</sup> It would therefore have to be said that most of the kraft paperboard (possibly the great majority) causes no injury at all to an Australian industry defined as a producer of 12+ can beverage multipacks.
    - b. Dumping margins: GPI is not aware of any provision in Part XVB for assigning different dumping margins depending on a particular end use or end uses of the goods. Dumping duties may need to be calculated and applied to all of the goods irrespective of whether or not they caused any injury to the Australian producer of 12+ beverage can multipacks. That would run against the broad intentions of the anti-dumping legislation.
    - c. Imposition of dumping duties: If the ADC found its way through the abovementioned problems and managed to impose dumping duties only on kraft paperboard that was intended for use in 12+ beverage can multipacks the problems would only have started. Would importers have to declare the intended end use of individual rolls of kraft paperboard? What if those intentions changed after importation? Or if a roll of kraft paperboard intended for one use was sold to another party after importation and that other party used it differently? There is no provision in Part XVB of the *Customs Act 1901* for regulation of how imported goods are used subsequent to importation.

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<sup>10</sup> WestRock 9 June 2020 submission.

<sup>11</sup> GPI's 21 September 2020 submission at paragraphs 11 to 17.

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12. GPI submits that these imponderables only serve to show that the Australian anti-dumping legislation, and the legislative concept of like goods, is properly based on the goods as they come across the Australian docks and not on some subsequent use of those goods.
13. If the ADC is considering what would be a radical shift away from its conventional approach to like goods toward a greater focus on end use, GPI submits that this should rather form part of a broader and more transparent review of its policies and legislation. Such a review might usefully canvas the views of analysts in the department, Australian Border Force and regular users of Australia's anti-dumping system. In any event it would be objectively unfair to make a major change of approach to its like goods assessments in the advanced stages of the current matter where substantial resources have been expended by parties in reliance on the conventional approach to like goods assessment (as contained in section 2 of the *ADC's Dumping and Subsidy Manual*).<sup>12</sup>
14. Such a review of the ADC's approach to like goods might also usefully review WTO jurisprudence on like goods to assess whether the approach proposed by Visy and Vanderhoek accords with Australia's international obligations. At least one WTO decision, *United States-Definition of Industry Concerning Wine and Grape Products*, suggests that the approach proposed by Visy and Dr Vanderhoek would not accord with Australia's obligations under the Anti-Dumping Agreement. That decision was discussed in the *Journal of World Trade*:<sup>13</sup>

On the other hand, the Panel in *United States-Definition of Industry Concerning Wine and Grape Products* speaks to the problem of "like product" definitions that are too broad. In that case, the Panel considered amendments the United States had made to its antidumping and countervailing duty laws to the effect that wine and grapes would be considered to be "like products". The Panel rejected that interpretation, holding that:

"because of different physical characteristics, wine and grapes were not 'like products' in the sense of the Code. In view of the precise definition of 'domestic industry', the Panel considered that producers of the like products could be interpreted to comprise only producers of wine."

15. The Panel in *United States-Definition of Industry Concerning Wine and Grape Products* rejected an interpretation that would make grapes and wine, the

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<sup>12</sup> GPI notes case law to the effect that a decision maker who does not follow their own publicly stated criteria may be subject to review on the basis of unreasonableness (see *Taveli v Minister for Immigration* [1989] FCA 175; 86 ALR 435 at paragraph 62) or irrationality (section [5.200] of *Judicial Review of Administrative Action and Government Liability*, 6ed, Aronson, Groves, Weeks).

<sup>13</sup> Marco Bronkers and Natalie McNelis, *Journal of World Trade* 33(3) 73-91, 1999, "Rethinking the 'Like Product' Definition in WTO Antidumping Law" at page 79.

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downstream product produced from grapes, like goods. The determinative consideration was the difference in physical characteristics between wine and grapes.

16. GPI submits that adopting the radical change to like goods assessment proposed by Visy and Dr Vanderhoek without taking the opportunity to properly assess its wider implications risks substantial missteps. Any such misstep would likely enliven calls from the likes of the Productivity Commission for major reform of Australia's anti-dumping system.

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3. The Vanderhoek report makes its comparison only in respect of “12+ beverage can multipacks” and so does not account for other end uses
17. GPI submits that the Vanderhoek report makes its comparison only of “12+ beverage can multipacks” (a level of production of a particular end use that occurs well after importation of the goods) and so does not account for the facts regarding other end uses. These facts include that:
  - a. Most kraft paperboard imported to Australia is used for end uses other than 12+ beverage can multipacks.
  - b. A substantial amount of microflute produced in Australia is used for end uses other than 12+ beverage can multipacks.
18. If the ADC accepts the urgings of the Vanderhoek report that products are “most sensibly compared at the final product stage,”<sup>14</sup> then all products produced using kraft paperboard and microflute should be compared together at the final stage. To choose the only common end use in which to make a comparison presupposes the outcome in favour of finding likeness.
19. GPI has prepared a table to illustrate what a comparison might look like when all products produced using kraft paperboard and microflute are compared together at the final stage. That table is contained in the **Confidential Appendix** and indicates that when taking account of all uses of kraft paperboard and microflute the overlap is less than [**confidential proportion** ██████████]. This is a highly conservative analysis as it does not account for other corrugated cartons used for packaging.<sup>15</sup>
20. To be clear, GPI does not consider that making the assessment based on end use is the approach anticipated by the *Customs Act 1901*, the Anti-Dumping Agreement or the ADC’s own *Dumping and Subsidy Manual*.<sup>16</sup> However, the clear implication of the facts regarding other end uses is that, even assessed on the basis of end use, kraft paperboard and microflute are not like goods.
  - a. Most kraft paperboard imported to Australia is used for end uses other than 12+ beverage can multipacks
21. GPI observed (and provided evidence) in its submissions of 13 May 2020 and 21 September 2020 that microflute is not commercially alike to kraft paperboard. That

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<sup>14</sup> Vanderhoek report at paragraph 6.7.

<sup>15</sup> See paragraph 59 below and GPI’s other submissions to this investigation.

<sup>16</sup> GPI notes case law to the effect that a decision maker who does not follow their own publicly stated criteria may be subject to review on the basis of unreasonableness (see *Taveli v Minister for Immigration* [1989] FCA 175; 86 ALR 435 at paragraph 62) or irrationality (section [5.200] of *Judicial Review of Administrative Action and Government Liability*, 6ed, Aronson, Groves, Weeks).

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observation was based on important commercial facts stemming from material physical differences between microflute and kraft paperboard. In particular, most (perhaps the great majority) of the wet strength treated kraft paperboard sold in Australia does not even compete with Visy's microflute in 12+ beverage can multipacks.

22. Those important commercial facts also bear on a question regarding like goods that is focused on end use. To be clear, GPI does not accept that that is the question that the legislation asks; rather the legislation and ADC's consistent application of the legislation focusses on the physical, commercial, functional and production differences of the goods as they cross the Australian docks and claimed like goods.<sup>17</sup> But if the question is to focus on end use, as Visy and the Vanderhoek report advocate, then other end uses must be brought to bear on that question; to do otherwise is to presuppose the answer to the question of like goods.

**[Start confidential – GPI production and sales of different sized beverage packages]**

[Redacted]

[Redacted]

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<sup>17</sup> See GPI's submissions of 21 September 2020 at section 1 and of 13 May 2020 at section 2.

**Page redacted in full**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[End confidential – GPI production and sales of different sized beverage packages]

30. GPI considers that these facts can be confirmed by verified data held by the ADC.

b. Substantial quantities of microflute produced in Australia are used for end uses other than 12+ beverage can multipacks

31. GPI's submissions have consistently demonstrated that Visy is not the only producer of microflute in Australia.<sup>20</sup> These were based on common industry knowledge that Orora/Opal has two high capacity Asitrade machines that are capable of producing microflute. GPI has estimated that, with Opal's microflute production and Visy's non-

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18 [REDACTED]

19 [REDACTED]

<sup>20</sup> GPI's 13 May 2020 submission at paragraph 35; Addendum to GPI's submission of 26 July 2020; GPI's submission of 21 September 2020 at section 3.

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beverage microflute production, around three quarters of Australian microflute is used in end uses other than beverage packages.<sup>21</sup>

32. In response, to Visy's vehement claims that Orora does not produce microflute<sup>22</sup> GPI obtained and provided photographic evidence of Orora produced microflute used in packaging by Australia's largest chocolate producer.<sup>23</sup> A sample of Orora produced microflute was sent to the ADC on 14 August 2020, together with other samples.<sup>24</sup> The Orora produced packaging is demonstrably microflute and very similar to Visy's microflute.
33. GPI observed from this evidence that microflute and kraft paperboard are not commercially alike because they do not compete in the majority of uses. Similarly, for a like goods argument based on end use proposed by Visy and Dr Vanderhoek, microflute produced in Australia for other end uses, including Orora's microflute and Visy microflute used other than for beverage packaging, should also be taken into account.

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<sup>21</sup> GPI's first submission at [35].

<sup>22</sup> Visy's first submission at section 3.8 at page 9.

<sup>23</sup> See GPI's submission of 21 September 2020 at Figures 5 and 6.

<sup>24</sup> Letter to the ADC dated 14 August 2020.

4. There is expert evidence before the ADC that squarely considers and answers the question of whether microflute is a like good to kraft paperboard, the Klass Reports
  34. GPI submits that there is expert evidence before the ADC that squarely considers and answers the question of whether microflute is a like good to kraft paperboard without qualification, the Klass Reports. That is in contrast to the Vanderhoek report, does not answer the question except by reference to end use (see section 1 above).
  35. Charles P Klass was retained by GPI to directly answer the key question in the investigation:<sup>25</sup> is microflute a like good to the goods under consideration? Mr Klass's overall conclusion was unambiguous, microflute and kraft paperboard are not like goods:<sup>26</sup>

In my opinion, microflute and the goods under consideration are not like goods. Indeed, for the reasons started in this report, they are very different products.

The very different physical and other characteristics come from the very substantial production differences. Kraft paperboard is made on a paper machine. Microflute is not a product made on a paper machine. Microflute is a converted product made by combining three layers of paperboard on a corrugator.

36. Importantly, Mr Klass addressed the question directly and without qualifying his conclusions by reference to end use. GPI submits that Mr Klass's opinion is expert evidence directly addressing the legislative test for like goods, ie as a comparison of the goods as they cross the Australian docks and the claimed like goods.
37. The expert evidence in the Klass Reports remains largely unchallenged in the investigation. As such it provides a solid foundation on which the ADC may form its views in the statement of essential facts and final report.
  - a. Klass Reports are independent evidence from a highly qualified and internationally experienced expert in the field of paper and packaging
38. Mr Klass has almost 60 years working in the paper industry in the United States and internationally. For over 20 years he has been Adjunct Professor of Paper Engineering, Chemical Engineering and Imaging at the Western Michigan University<sup>27</sup> and also teaches internationally. Mr Klass has authored numerous publications in the field of papermaking and packaging and was selected to update several chapters of the latest edition of the *Handbook for Pulp & Paper Technologists*,<sup>28</sup> also known as

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<sup>25</sup> Klass Report at page 2.

<sup>26</sup> Klass Report at page 2.

<sup>27</sup> Klass Report at page 3.

<sup>28</sup> Klass Report at page 3.

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the Smook Book.<sup>29</sup> Mr Klass's experience and qualifications are further described in the Klass Report and his curriculum vitae is at Appendix B of the Klass Report.

39. The breadth and depth of Mr Klass's experience in international paper and packaging serve to provide further confidence of his independence. His resulting standing in the field puts him beyond any real or perceived influence from any regional market operator. It would not be exaggerating to say that, as a paper and packaging expert, he is the very antithesis of an Australian paper industry insider.

b. Klass assesses differences in terms of physical, commercial, functional and production likeness

40. Mr Klass made his assessment of the differences between microflute and kraft paperboard in terms of their physical likeness,<sup>30</sup> commercial likeness,<sup>31</sup> functional likeness<sup>32</sup> and production likeness.<sup>33</sup> That assessment accords with the conventional approach to assessing like goods set out in the ADC's *Dumping and Subsidy Manual*.<sup>34</sup> Mr Klass found that microflute and kraft paperboard were not alike having regard to any of those considerations and his overall conclusion was that microflute and kraft paperboard are not like goods.<sup>35</sup>

41. In particular, Mr Klass found that there were "significant physical differences" between microflute and kraft paperboard. Those differences stemmed from the very different ways in which they are produced.<sup>36</sup> Mr Klass observed that they may appear alike when printed and in end use applications but there were nonetheless "dramatic differences in the two materials".<sup>37</sup> Kraft paperboard is a solid product produced completely on a fourdrinier paper making machine whereas corrugated board such as microflute is produced as separate layers on a number of machines and then converted on a corrugator.<sup>38</sup> A full assessment of the physical differences

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<sup>29</sup> The Technical Association of Pulp and Paper Industry (TAPPI) describes the Smook Book it as "the "Must Have" book for professionals in the Pulp & Paper Industry" and "the preferred and most widely used P&P text by companies, colleges, and universities", <https://www.tappi.org/publications-standards/books/deals/smook-book/>.

<sup>30</sup> Klass Report at page 5 and following.

<sup>31</sup> Klass Report at pages 14 to 15.

<sup>32</sup> Klass Report at pages 15 to 16.

<sup>33</sup> Klass Report at page 16.

<sup>34</sup> *Dumping and Subsidy Manual* at section 2.

<sup>35</sup> Klass Report at page 2.

<sup>36</sup> Klass Report at page 5.

<sup>37</sup> Klass Report at page 5.

<sup>38</sup> Klass Report at pages 5 to 8; the Klass Report also observes that box blanks may be die cut and converted to box blanks "in line" at the end of the corrugator (ie in a continuous process), in which case microflute (as distinct from its end use as packaging) would only exist fleetingly inside the converting machinery.

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between microflute and kraft paperboard is contained at pages 5 to 14 of the Klass Report.

42. In the Supplementary Klass Report, Mr Klass undertook further analysis of the physical differences of microflute and kraft paperboard by reference to ISO standard *ISO 534:2011 - Paper and board — Determination of thickness, density and specific volume*. Under ISO 534:2011 the bulk of paper and board is expressed as cubic centimetres per gram. Mr Klass used the ISO mandated formula to calculate the bulk of Visy's microflute and GPI's kraft paperboard and found that, at a given grams per square metre, microflute has more than 50 per cent greater bulk than kraft paperboard. Mr Klass concluded that this confirmed his earlier findings that microflute and kraft paperboard are "significantly different goods physically" and stated that measures of bulk (such as that in ISO 534:2011) "provide a very informative comparison of microflute and kraft paperboard".<sup>39</sup>

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<sup>39</sup> Supplementary Klass Report at page 9.

5. The Vanderhoek report, if anything, confirms aspects of expert evidence provided in the Klass Reports
43. GPI submits that the Vanderhoek report, if anything, confirms aspects of expert evidence provided in the Klass Reports. In particular, microflute in Australia may not exist other than transiently in an inline converting process.
44. The Klass Report observed that box blanks may be die cut and converted to box blanks “in line” at the end of the corrugator (ie in a continuous process),<sup>40</sup> in which case microflute (as distinct from its end use as packaging) would only exist fleetingly inside the converting machinery (emphasis added):<sup>41</sup>
- Microflute is often preprinted and supplied as microflute corrugated to be converted by die cutting. *If it is done in line on the corrugator, microflute exists only for a short time in the corrugating line.* Coated kraft paperboard is imported as rolls that are subsequently sheeted and printed by offset lithography for converting into beverage carriers.
45. GPI has referred the ADC to Visy’s statements that it has invested heavily, and continues to invest,<sup>42</sup> in capital for its microflute production. That investment may have resulted in microflute and beverage packaging being produced in line.<sup>43</sup> Visy has so far failed to provide anything firmer than assertions that it does not do so and GPI understands that the ADC has not had the benefit of a site visit to Visy’s premises.
46. The Vanderhoek report re-enlivens the issue. Dr Vanderhoek does not discuss the production of microflute as a distinct stage of production. Rather the Vanderhoek report includes a description of the formation of microflute only in its discussion of box manufacture.<sup>44</sup> That description is consistent with microflute and packaging being produced simultaneously on in line machinery.
47. If Visy’s microflute and beverage packaging is produced in line (as now suggested in two expert reports), that would go some way to explaining Visy’s vehement insistence that the Australian industry is one that produces packaging and not microflute as a distinct product.<sup>45</sup>
48. At the very least, Dr Vanderhoek’s treatment of microflute production confirms the evidence of Mr Klass that microflute is properly understood as an additional

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<sup>40</sup> Klass Report at page 8.

<sup>41</sup> Klass Report at page 15.

<sup>42</sup> Visy’s first submission at pages 3 and 12.

<sup>43</sup> GPI’s submission of 21 September 2020 at footnote 49.

<sup>44</sup> Vanderhoek report at paragraph 5.89 and following.

<sup>45</sup> Visy’s first submission at section 3.8 at page 9.



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*conversion* process of paper products.<sup>46</sup> This is in contrast to kraft paperboard, which is made on a paper machine and is only converted at the box making stage.

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<sup>46</sup> See the Klass Report generally but in particular at page 6 and the conclusion at page 2.

6. The ADC must assess and evaluate the Vanderhoek report as it would any other evidence
49. GPI submits that the ADC must assess and evaluate the Vanderhoek report as it would any other evidence before it in the investigation; the Vanderhoek report does not have a special status by virtue of the fact that the ADC engaged its own expert to provide the report.
50. It is trite law that the ADC and the Commissioner cannot delegate its factfinding functions and powers to Dr Vanderhoek<sup>47</sup>. It follows that the ADC cannot simply adopt the conclusions in the Vanderhoek report as its own; rather it must assess and evaluate the Vanderhoek report together with other evidence before it in the investigation.
51. It is the administrative decision maker, here the Commissioner assisted by the ADC, and not a consultant who has the obligation to give proper, genuine and realistic consideration to the merits of the case (see section [5.150] of *Judicial Review of Administrative Action and Government Liability*).

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<sup>47</sup> See generally section 6.2 of *Judicial Review of Administrative Action and Government Liability*, 6ed, Aronson, Groves, Weeks.

## 7. Other issues with the Vanderhoek report

52. GPI submits that there are other issues with the Vanderhoek report including:

- a. There are issues of transparency; and
- b. There are factual errors.

*There are issues of transparency*

53. GPI submits that there are issues of transparency with the Vanderhoek report.

54. Firstly, GPI observes that Dr Vanderhoek had communications regarding the investigation with a person or persons in and around early September 2020.<sup>48</sup> Noting that the request for a quote from the ADC to Dr Vanderhoek was only sent on 9 October 2020,<sup>49</sup> it is not clear what those communications were or who Dr Vanderhoek was communicating with. In the interests of transparency and fairness to parties in the investigation, the ADC should disclose all communications between it (or any other party) and Dr Vanderhoek in relation to the investigation.

55. Secondly, Dr Vanderhoek is a paper consultant working in a market that is dominated by two large and influential paper company groups, one of which is Visy (including it and its related parties). GPI's inquiries indicate that at least some of the work Dr Vanderhoek has undertaken has also involved Visy (or related parties). Again, in the interests of transparency and fairness to parties in the investigation, any and all connections or interactions between Visy (or a related party) and Dr Vanderhoek should be disclosed, including any consultancy work undertaken by Dr Vanderhoek for or for the benefit of Visy or a related party.

56. Thirdly, there appears to be little factual or logical linkage between the material in the body of the report and key aspects of the conclusions. In particular, GPI observes that beverage can multipacks of any size are not mentioned at all in the body of the Vanderhoek report, let alone any discussion of the characteristics of beverage can multipacks for different numbers of cans. Indeed, beverage packaging gets no express mention in the body of the report (other than at page 2 where Dr Vanderhoek briefly describes communicating regarding the case). Yet his answers and conclusions in sections 6 and 7 are made specifically in terms of 12+ beverage can multipacks. GPI queries whether, with the resulting factual and logical gap, the ADC could in any event properly rely on it in making its decision.<sup>50</sup>

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<sup>48</sup> Vanderhoek report at paragraphs 5.3 to 5.5.

<sup>49</sup> Letter of instruction at page 1.

<sup>50</sup> GPI submits that the ADC's obligation to give proper, genuine and realistic consideration to the merits of the case (see section [5.150] of Aronson et al, *Judicial Review of Administrative Action and Government*

*There are factual errors*

57. GPI submits that there are factual errors in the Vanderhoek report that go directly to one of the conclusions in the Vanderhoek report. At paragraph 7.1(c) Dr Vanderhoek states:

There is no other fibrous product closely resembling kraft paperboard, other than microflute, able to meet the 12+ beverage can multipack performance requirements in their entirety.

58. That conclusion was in relation to the (different) question put by the ADC: “In addition to microflute, do you consider there to be other products which closely resemble kraft paperboard?”

59. On the evidence before the ADC, that conclusion in the Vanderhoek conclusion is incorrect. It is clear from that evidence already before the ADC that there are other products which closely resemble kraft paperboard and/or are used in Australia for 12+ beverage can multipacks, including the following:

- a. Corrugated packaging other than microflute: GPI provided evidence in its submission of 24 July 2020 at section 4.c of 24 beverage can multipacks produced last year by Visy (or a related entity) for one of Australia’s most popular brands of beer. That packaging (a sample of which was provided to the ADC on 14 August 2020) used corrugated packaging other than microflute. GPI’s submission observed that a brief informal survey of a local liquor store indicated that there were quite a number of other brands using corrugated packaging other than microflute.<sup>51</sup>
- b. Kraft paperboard that is not wet strength treated: kraft paperboard that is not wet strength treated is identical to the goods but for the fact that it is not wet strength treated.<sup>52</sup>

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*Liability*) would mean, by corollary, that the ADC cannot simply rely on the conclusions of an expert that do not logically or factually follow from matters that the expert considered.

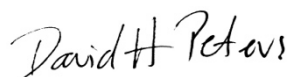
<sup>51</sup> GPI submission of 24 July 2020 at paragraph 70.

<sup>52</sup> The ADC may have access to verified data regarding non wet strength treated kraft paperboard.

## 8. Final remarks

60. GPI once again repeats its submission that microflute is demonstrably not a like good to kraft paperboard. The reasons for and evidence supporting that submission can be found in this and in previous submissions provided by GPI.
61. In particular, GPI reiterates the fact that the goods are large, unprinted rolls of solid kraft paperboard that are yet to have any conversion process applied.<sup>53</sup> The closest Visy comes to having a like good is as sheets that have already been printed and converted into a narrow caliper corrugated cardboard. The ADC hardly needs to have an expert tell it that these products do not closely resemble one another. If it does need an expert to tell it that then it has the Klass Reports.
62. The question of like goods is foundational to the investigation. That that foundational question remains unresolved more than 10 months since the investigation was initiated is now a source of substantial unfairness to parties. Article 5.10 of the Anti-Dumping Agreement relevantly provides that investigations "shall, except in special circumstances, be concluded within one year" (which period will be easily exceeded on the ADC's currently proposed time line). GPI submits that a failure by Visy to satisfy the ADC that it produces like goods is not a special circumstance under the Agreement.
63. The Minister must be positively satisfied of the matters in s 269TG, including that there is a Australian industry producing like goods; if the ADC has insufficient basis on which to recommend under s 269TEA that the Minister should be so satisfied then no such recommendation may be made (s 269TE(2)). GPI submits that the evidence now before the ADC is more than ample to satisfy the Commissioner that there is no injury to an Australian industry that produces like goods; on that basis, s 269TDA (13) provides that the Commissioner must terminate the investigation.
64. GPI is grateful for the opportunity to make this further submission on the investigation. Please let me know if you need any further information or elaboration to the information provided in this or GPI's other submissions.

Sincerely



**David Peters**  
**Principal Lawyer**  
**Kinsman Legal**

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<sup>53</sup> GPI submission of 21 September 2020 at section 4.